

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DANIEL COHEN, individually and on behalf of all others similarly situated,

**Plaintiff,**

V.

BLACKBAUD, INC., THE PRESIDENT AND  
FELLOWS OF HARVARD COLLEGE, and  
BANK STREET COLLEGE OF EDUCATION,

#### Defendants.

Case No. 2:20-cv-01388-JCC

**DEFENDANT PRESIDENT AND  
FELLOWS OF HARVARD  
COLLEGE'S REPLY IN SUPPORT  
OF MOTION TO DISMISS  
PLAINTIFF'S AMENDED  
COMPLAINT**

**NOTE ON MOTION CALENDAR:  
JANUARY 22, 2021**

## ORAL ARGUMENT REQUESTED

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1 Plaintiff's opposition confirms that this Court lacks personal jurisdiction over Harvard. He  
 2 ignores the governing legal standard and cites no facts showing that his claims arise from activities  
 3 Harvard purposefully directed toward Washington. The only connection between this lawsuit and  
 4 Washington is that Plaintiff happens to reside here; that fortuity cannot establish specific  
 5 jurisdiction over Harvard in Washington. Plaintiff's opposition also confirms he lacks standing to  
 6 sue *Harvard*, as opposed to Blackbaud. His claims against Harvard allege disclosure of non-  
 7 sensitive information that caused him no harm. That Blackbaud may have other customers whose  
 8 sensitive information was exposed does not establish standing against Harvard. Finally, Plaintiff's  
 9 claims suffer from myriad pleading failures, which his opposition does not solve. Because Plaintiff  
 10 has already had a chance to amend, the Amended Complaint should be dismissed with prejudice.

11 **I. Plaintiff Has Failed to Allege Personal Jurisdiction Over Harvard**

12 Plaintiff does not dispute he must plead general or specific jurisdiction over Harvard. While  
 13 he asserts that "Harvard targeted Washington generally," Pl.'s Opp'n 3, ECF No. 57, he cannot  
 14 demonstrate general jurisdiction over Harvard in Washington. Despite Plaintiff's characterization  
 15 of Harvard as having "satellite operations in every state," *id.* at 4, he concedes that Harvard "is a  
 16 Massachusetts not-for-profit corporation with its principal place of business in Massachusetts,"  
 17 Am. Compl. ¶ 17. Under the governing standard, therefore, Washington lacks general jurisdiction  
 18 over Harvard. *See BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017); Mot. 5, ECF No. 56.

19 Nor can Plaintiff manufacture specific jurisdiction in this case. Plaintiff does not dispute  
 20 that *his* presence in Washington, on its own, cannot establish personal jurisdiction over Harvard.  
 21 *Walden v. Fiore*, 571 U.S. 277, 285 (2014). Nor can Plaintiff rely on allegations that "Harvard  
 22 targeted Washington generally." Pl.'s Opp'n 3. Specific jurisdiction requires "a connection  
 23 between the forum and the specific claims at issue." *Bristol-Myers Squibb Co. v. Superior Court*,  
 24 137 S. Ct. 1773, 1781 (2017). General contacts with a forum having nothing to do with a plaintiff's  
 25 claims are not relevant and cannot establish jurisdiction. *Id.* Yet the only *relevant* interaction  
 26 Plaintiff alleges between Harvard and Washington was that Harvard sent him "an email notifying  
 27 him of the Data Breach," Am. Compl. ¶ 40—and sending emails "simply do[es] not qualify as

1 purposeful activity” in Washington, *Joseph Saveri Law Firm, Inc. v. Criden*, 696 F. App’x 189,  
 2 192 (9th Cir. 2017).

3 Accordingly, in his opposition, Plaintiff cites a series of events put on by the Harvard Club  
 4 of Seattle and an alumni event held to welcome the class of 2020. Neither supports jurisdiction  
 5 here, for at least three reasons. First, Plaintiff does not allege that his data was collected by Harvard  
 6 at an event in Washington. Rather, he asserts that Harvard “stor[ed] his personal information[] for  
 7 *seventeen years* after he graduated (*despite no activity on Plaintiff’s part*).” Pl.’s Opp’n 5  
 8 (emphases added). Plaintiff thus confirms that any relevant conduct by Harvard took place while  
 9 Plaintiff was a student in Massachusetts—not in the State of Washington. Second, while Plaintiff  
 10 references alumni events in Washington, he does not allege that he attended them; there is thus no  
 11 “connection between” those events “and the specific claims at issue.” *Bristol-Myers*, 137 S.  
 12 Ct. at 1781. Indeed, the events Plaintiff references took place *after* the events in Plaintiff’s  
 13 complaint and so could not possibly establish jurisdiction. Third, the Harvard Club of Seattle is  
 14 not Harvard. It is a separate organization incorporated in Washington. *Compare Mission*  
 15 *Statement*, Harvard Club of Seattle, <http://hcseattle.clubs.harvard.edu/about.html> (last visited Jan.  
 16 20, 2021) (click “Articles of Incorporation”), *with* Am. Compl. ¶ 17 (noting Harvard’s  
 17 incorporation in Massachusetts). Plaintiff cannot establish specific jurisdiction over Harvard by  
 18 citing events hosted by a separate entity in Washington, which he did not even attend.

19 Plaintiff also claims more generally that Harvard engages in marketing to “maintain its  
 20 brand worldwide,” Pl.’s Opp’n 4, and made “efforts to maintain relationships with Plaintiff and  
 21 the putative Class,” *id.* at 6, but he alleges no facts suggesting Harvard obtained or stored Plaintiff’s  
 22 data through activities Harvard conducted in Washington. Given his concession that his data was  
 23 collected seventeen years ago while he was a student in Massachusetts, he has not “show[n] that  
 24 he would not have suffered an injury ‘but for’ [Harvard’s] forum-related conduct.” *Menken v.*

<sup>1</sup> *Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007).<sup>1</sup> Harvard has a connection to Plaintiff because he attended Harvard in Massachusetts; the fact that Plaintiff now lives in Washington does not establish specific jurisdiction over Harvard in this case.

4 Plaintiff also asserts that Harvard “sought to profit from its relationship with Plaintiff,”  
5 Pl.’s Opp’n 5, and, for reasons not provided, claims Harvard should have “expect[ed] an injury to  
6 be felt in Washington State,” *id.* at 6. But Plaintiff cites no facts to support that bald assertion or  
7 tie it to his claims. Nor does Plaintiff allege that Harvard derived a benefit from activities it partook  
8 *in Washington*, which Plaintiff’s own case law concedes is necessary. *Id.* at 5 (citing *Burger King*  
9 *Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)). Put differently, Plaintiff claims Harvard generally  
10 attempted to maintain a relationship with Plaintiff in Washington, but he does not assert that  
11 Harvard either obtained or stored Plaintiff’s personal information in Washington, nor that Harvard  
12 engaged in any other act in Washington relevant to its storage of Plaintiff’s data. Other activities  
13 not relevant to his claims simply do not suffice. *See Bristol-Myers*, 137 S. Ct. at 1781.

Finally, Plaintiff has demonstrated no right or need for jurisdictional discovery. “[W]here a plaintiff’s claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by the defendants, the Court need not permit even limited discovery...” *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1160 (9th Cir. 2006). And jurisdictional discovery is inappropriate “when ‘it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction.’” *Laub v. U.S. Dep’t of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003). Here, Plaintiff does not even allege attenuated or bare contacts by Harvard in Washington having a connection to Plaintiff’s claims, even after Harvard filed its motion to dismiss the initial Complaint on jurisdictional grounds. Accordingly, the Court should dismiss Harvard as a defendant under Rule 12(b)(2).

<sup>25</sup> Plaintiff cites *Oregon Mutual Insurance Co. v. Barkley*, No. 2:18-cv-01342, 2019 WL 3891621  
<sup>26</sup> (W.D. Wash. Aug. 19, 2019), to suggest he meets the but-for test. Pl.’s Opp’n 6. But that case  
<sup>27</sup> involved an insurance policy negotiated and signed in Washington when the defendants were  
Washington residents. 2019 WL 3891621 at \*3. Plaintiff alleges no analogous contract made by  
Harvard in Washington, and Harvard has never been headquartered in Washington.

1       **II. Plaintiff Lacks Article III Standing**

2       Plaintiff's opposition does not cure the fundamental standing defect in his Amended  
 3 Complaint against Harvard. Plaintiff does not allege that any of *his* sensitive information was  
 4 obtained from *Harvard*, or that it actually has been used for fraudulent purposes. Mot. 8-9; Am.  
 5 Compl. ¶¶ 30, 34. Nor does Plaintiff allege that he has actually suffered from identity theft, rather  
 6 than from mere fear of it. Nothing in Plaintiff's opposition refutes these realities.

7       **Injury.** Plaintiff asserts two theories by which he was injured: invasion of privacy rights  
 8 and mitigation of damages. Pl.'s Opp'n 9-13.<sup>2</sup> Neither establishes Article III standing.

9       First, Plaintiff argues that whenever private information is disclosed to hackers, there is  
 10 Article III standing in the loss of the "right to privacy." If those magic words could conjure  
 11 standing here, they would do so in every case involving improper access to data. Yet Plaintiff does  
 12 not actually *cite* any case embracing a "right of privacy" theory on similar facts. Plaintiff cites a  
 13 single district court decision finding a privacy interest in not having one's entire social media feed  
 14 intentionally collected and monetized for profit. *See id.* at 9 (citing *In re Facebook, Inc., Consumer*  
 15 *Privacy User Profile Litigation*, 402 F. Supp. 3d 767, 785-86 (N.D. Cal. 2019)). Those facts are  
 16 materially different from data breach cases, where standing has regularly been found lacking in  
 17 response to a plaintiff's assertion of privacy interests. *See, e.g., In re Zappos.com*, 108 F. Supp. 3d  
 18 949, 962 n.5 (D. Nev. 2015) (loss of privacy inadequate to establish standing unless "that loss  
 19 amounts to a concrete and particularized injury"); *Khan v. Children's National Health System*, 188  
 20 F. Supp. 3d 524, 533 (D. Md. 2016) (alleged "loss of privacy" does not "constitute[] an injury in  
 21 fact" absent concrete "damages"). This Court should not become the first to adopt a "loss of  
 22 privacy" theory yielding standing every time personal information is improperly accessed.

23       As for Plaintiff's mitigation of damages theory, Plaintiff does not dispute that plaintiffs  
 24 "cannot manufacture standing by choosing to make expenditures based on hypothetical future

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26       <sup>2</sup> Plaintiff's opposition brief says nothing about Harvard's argument that his "loss of value" theory  
 27 cannot establish standing. Mot. 11-12. He therefore appears to abandon this theory of injury from  
 the Amended Complaint.

1 harm that is not certainly impending,” *Clapper v. Amnesty Int’l, USA*, 568 U.S. 398, 402 (2013),  
 2 and that claims based on “mitigation costs … rise and fall together” with the risk of future harm,  
 3 *Stasi v. Inmediata Health Grp. Corp.*, No. 19CV2353, 2020 WL 2126317, at \*9 (S.D. Cal. May 5,  
 4 2020). In all of Plaintiff’s cases, the courts found standing based on actual or threatened misuse.  
 5 See *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010); *Ruiz v. Gap, Inc.*, No. 09-  
 6 15971, 380 F. App’x 689, 691-92 (9th Cir. May 28, 2010); *Bass v. Facebook, Inc.*, 394 F. Supp.  
 7 3d 1024, 1035 (N.D. Cal. 2019); *Huynh v. Quora, Inc.*, No. 18-cv-07597-BLF, 2019 WL  
 8 11502875, at \*4-5 (N.D. Cal. Dec. 19, 2019). Here, however, Plaintiff has not suffered any actual  
 9 harm. Plaintiff asserts only the possibility of *future* misuse of his data. See Pl.’s Opp’n 9 (asserting  
 10 only that “it is easy to foresee the inevitability of the information to be used for illicit purposes”).  
 11 His failure to allege actual or imminently threatened harm is fatal to his standing. See, e.g., *Ables*  
 12 *v. Brooks Bros. Grp., Inc.*, No. CV 17-4309, 2018 WL 8806667, at \*5 (C.D. Cal. June 7, 2018).

13 Moreover, here the alleged risk of future harm does not meet the constitutional minimum  
 14 because Plaintiff’s allegedly stolen data was prosaic, not sensitive. Plaintiff admits the only data  
 15 in Harvard’s possession was alumni birthdates, addresses, employment information, and charitable  
 16 giving details. Pl.’s Opp’n 9, 10. The Ninth Circuit does not consider such information sensitive  
 17 enough to confer standing, in part because it is widely available. See Mot. 10-11; see also *Rahman*  
 18 *v. Marriott Int’l*, No. 20-00654, at \*3 (C.D. Cal. Jan. 12, 2021) (slip op.) (“Plaintiff has not  
 19 plausibly pled here that any of their more sensitive data—such as credit card information,  
 20 passports, or social security numbers—has fallen into the wrong hands. Without a breach of this  
 21 type of sensitive information, Plaintiff has not suffered an injury in fact and cannot meet the  
 22 constitutional requirements of standing.”).

23 Nor can Plaintiff manufacture constitutional standing by citing the Washington Data  
 24 Breach Act’s (“DBA”) treatment of birthdates as protected information. Pl.’s Opp’n 11. Even  
 25 assuming Plaintiff had a DBA claim based on the alleged theft of his birthdate, *but see infra* Part  
 26 III.D, “Article III standing requires a concrete injury even in the context of a statutory violation,”  
 27 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Unlike credit cards or social security

1 numbers, birthdates are not highly sensitive for Article III standing purposes, and in any event,  
 2 Plaintiff has not alleged an imminent risk of injury.

3 Next, Plaintiff speculates that highly sensitive information “could be included among the[]  
 4 descriptions” of data provided in Harvard’s data breach notice, in light of Blackbaud’s September  
 5 2020 announcement stating that sensitive information may have been stolen. Pl.’s Opp’n 11. But  
 6 Blackbaud’s announcement does *not* say such sensitive information was stolen *from Harvard*, as  
 7 opposed to other Blackbaud customers. Mot. 4, 8. Plaintiff provides nothing other than rank  
 8 speculation that Harvard might have stored such information about him; indeed, he does not cite  
 9 any allegation in his Amended Complaint that he provided any of the highly sensitive information  
 10 mentioned in his opposition brief. *Compare* Am. Compl. ¶ 41 (alleging only run-of-the-mill  
 11 information like “names,” “addresses,” and “birthdates”), *with* Pl.’s Opp’n 11 (speculating that  
 12 information like compensation, income tax, or health insurance “could be included”). Plaintiff is  
 13 in a position to know what information he provided the Harvard Office of Alumni Engagement.  
 14 Am. Compl. ¶ 62. Yet nowhere in his Amended Complaint does he allege that he provided highly  
 15 sensitive information to Harvard, that Harvard was reasonably likely to have obtained such  
 16 information, or that such information was in fact among the Harvard data stored with Blackbaud.  
 17 Article III injury is not “certainly impending” when based on an “attenuated chain of possibilities.”  
 18 *Clapper*, 568 U.S. at 410. The Amended Complaint should thus be dismissed.

19 **Traceability.** Plaintiff also has barely attempted to explain how his alleged injuries could  
 20 be “fairly traceable to the challenged action.” *Krottner*, 628 F.3d at 1141. He again speculates that  
 21 Harvard might have maintained his sensitive information, based on Blackbaud’s September 2020  
 22 statement—which, again, said nothing about Harvard’s having such information. Pl.’s Opp’n 12-  
 23 13. Even still, Plaintiff does not explain, in either his Amended Complaint or his opposition brief,  
 24 how the hypothetical, unidentified “reasonable” procedures Plaintiff claims Harvard failed to  
 25 adopt would have prevented exposure of his personal information. *See Anderson v. Kimpton Hotel*  
 26 & Rest. Grp., LLC, No. 19-CV-01860, 2019 WL 3753308, at \*3-4 (N.D. Cal. Aug. 8, 2019) (failure  
 27 to identify “adequate action” not taken defeats standing). Nor does Plaintiff explain, much less

1       allege in the Amended Complaint, how Harvard’s “data retention practices ... contributed to the  
 2 occurrence and severity of the Data Breach,” Am. Compl. ¶ 10, or how Harvard’s alleged delay in  
 3 informing him of the breach of his non-sensitive data caused him harm when he experienced no  
 4 instances of fraud during the alleged delay. And Plaintiff has failed to allege that any injury is  
 5 traceable to *Harvard*’s actions, rather than Bank Street’s or the Tenement Museum’s or  
 6 Blackbaud’s. *See* Mot. 12-13.<sup>3</sup> For these reasons, Plaintiff lacks standing.

7       **Injunctive Relief.** Plaintiff also provides no substantive response to Harvard’s argument  
 8 that he lacks standing to seek an injunction. He merely claims the threatened injury is “ongoing,”  
 9 “since Harvard and Blackbaud have yet to complete their investigation.” Pl.’s Opp’n 13. But his  
 10 amended complaint says that only *Blackbaud* has an ongoing investigation, not Harvard. Am.  
 11 Compl. ¶¶ 30, 32. Regardless, to obtain injunctive relief, plaintiffs “must demonstrate that they are  
 12 ‘realistically threatened by a *repetition* of the violation.’” *Gest v. Bradbury*, 443 F.3d 1177, 1181  
 13 (9th Cir. 2006) (emphasis added). “[A]n order requiring [Harvard] to enhance [its] cybersecurity  
 14 in the future ... will not provide any relief for past injuries or injuries incurred in the future because  
 15 of a data breach that has already occurred.” *Dugas v. Starwood Hotels & Resorts Worldwide, Inc.*,  
 16 No.: 3:16-cv-00014, 2016 WL 6523428, at \*8 (S.D. Cal. Nov. 3, 2016) (quotation marks omitted).

17       **III. Plaintiff Cannot State A Plausible Claim Against Harvard.**

18       Plaintiff’s defense of his individual claims suffers from the same fundamental flaw: he  
 19 impermissibly attempts to impute Blackbaud’s alleged conduct to Harvard, and he substitutes  
 20 conclusory assertions for facts.

21       **A. Choice of Law.**

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 24       <sup>3</sup> *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688 (7th Cir. 2015), cited by Plaintiff, *see* Pl.’s  
 25 Opp’n 23, does not establish traceability. In *Remijas*, the court rejected the argument that the  
 26 plaintiff’s data might have been exposed in other, *unrelated* data breaches. 794 F.3d at 696. Here,  
 27 Plaintiff’s information was allegedly exposed to a *single* hacker in one hack. No speculation is  
 required as to whether his data might have been exposed had Harvard not been involved; Plaintiff  
 himself alleges that Blackbaud possessed his data from several different clients. *See* Mot. 12-13.

1 Plaintiff fights the application of Massachusetts law where it is fatal to his claims. But there  
 2 is no real dispute that Massachusetts has the most significant relationship to Plaintiff's claims  
 3 against Harvard. Plaintiff admits he provided his information to Harvard *in Massachusetts*. Pl.'s  
 4 Opp'n 5. Nor does Plaintiff allege as fact in the Amended Complaint what he raises as  
 5 hypotheticals in his opposition: that Harvard might have had "persons involved in data security  
 6 decision-making, implementation, and training" located in Washington, *id.* at 15, or that the  
 7 relationship between Harvard and Blackbaud may have been centered in Washington, *id.* at 16.  
 8 Both possibilities are wildly speculative given that Harvard's operations are centered in  
 9 Massachusetts and Blackbaud's in South Carolina.

10 Indeed, Plaintiff essentially concedes that Harvard's relationship to Washington in this case  
 11 boils down to a single email Harvard sent to Plaintiff alerting him of the Blackbaud breach while  
 12 he happened to reside in Washington, and sent at the same time Harvard alerted others around the  
 13 country of the same incident. *See supra* at 2-3. That is the prototypical "fortuitous" relationship in  
 14 which Washington's choice-of-law rules would discount Plaintiff's residence in the choice-of-law  
 15 analysis. *See Veridian Credit Union v. Eddie Bauer, LLC*, 295 F. Supp. 3d 1140, 1153 (W.D.  
 16 Wash. 2017). The *Veridian* case is directly on point. It is a data breach case where the court easily  
 17 resolved choice-of-law issues at the 12(b)(6) stage. The Court should apply the same analysis here.

18 Even if resolving choice of law now were premature, as Plaintiff contends, Plaintiff would  
 19 be incorrect that Washington law would then apply by default. Pl.'s Opp'n 16. Plaintiff's own  
 20 cases demonstrate that if a court needs more information before making a choice-of-law  
 21 determination, then the court must apply *both* states' laws. *See Foisie v. Worcester Polytechnic*  
 22 *Inst.*, 967 F.3d 27, 44 (1st Cir. 2020) (instructing district court to evaluate the "claims under each  
 23 state's law"); *In re Capital One Consumer Data Sec. Breach Litig.*, No. 1:19MD2915 (AJT/JFA),  
 24 2020 WL 5629790, at \*5 (E.D. Va. Sept. 18, 2020) (considering "each of the asserted claims under  
 25 California, Florida, New York, Texas, Virginia, and Washington law"). Harvard's motion  
 26 established that Plaintiff's claims fail under Massachusetts law; by not addressing this point,  
 27 Plaintiff concedes it.

Finally, Harvard has *not* conceded that Plaintiff's claims are adequately pled under Washington law, nor has it premised its motion to dismiss solely on Massachusetts law. Pl.'s Opp'n 14. To the contrary, Harvard argued that Plaintiff's claims *also* fail under Washington law. See Mot. 17 n.8, 22 n.12, 26, 27 nn.14-15. That remains true.

#### **B. Plaintiff's Negligence Claim Fails.**

Plaintiff attempts to salvage his negligence claim by improperly imputing Blackbaud's actions—including its “payment of a ransom,” Pl.'s Opp'n 16-17—to Harvard. But Plaintiff has no theory by which Blackbaud's alleged negligence in permitting, failing to detect, or responding to a data breach could be legally imputed to Harvard.

Plaintiff also repeats his conclusory allegations that Harvard failed to conduct due diligence, monitoring or oversight over Blackbaud. How so? One cannot say from reviewing the Amended Complaint, because it says nothing about how Harvard's practices depart from reasonable standards, how different practices would have prevented a hack, or even what exactly *Harvard in particular* — as opposed to Blackbaud — is alleged to have failed to do.

Nor does Plaintiff's threadbare allegation that Harvard held his data for “decades without any legitimate purpose for its retention” establish negligence. Pl.'s Opp'n 17. As explained in Harvard's Motion, that is an entirely reasonable and expected practice for a university alumni affairs department; it is not a legally plausible claim that a university alumni affairs department commits negligence by retaining data about its alumni. Mot. 12 n.5.

Plaintiff also repeats his allegation that Harvard failed to notify him of the data breach soon enough; but Plaintiff alleges that *Harvard* learned of the breach far later than Blackbaud did, not long before informing Plaintiff. Mot. 3, 26. Plaintiff's allegations about when the breach occurred, or when Blackbaud learned of the breach, cannot establish a negligence claim against Harvard.

Finally, Plaintiff's attempt to evade the economic loss doctrine is based entirely on his assertion that the breach included highly sensitive information like credit card data or social security numbers. Pl.'s Opp'n 19. This argument fails, however, because Plaintiff has not alleged that such highly sensitive information was obtained *from Harvard*, or even that Harvard possessed

1 any of Plaintiff's highly sensitive information. Mot. 18-19; *supra* at 6. Thus, the economic loss  
 2 doctrine bars Plaintiff's negligence claim.

3 **C. Plaintiff's Breach of Contract Claim Fails.**

4 Plaintiff cannot fight the fact that "a corporate privacy policy is not enforceable ...  
 5 unattached to some underlying contract." *Dolmage v. Combined Ins. Co. of Am.*, No. 14 C 3809,  
 6 2017 WL 5178792, at \*5 n.3 (N.D. Ill. Nov. 8, 2017) (citing cases); Mot. 19. The cases Plaintiff  
 7 cites reinforce this proposition; each involves underlying contracts incorporating defendants'  
 8 privacy policies. *See Fox v. Iowa Health Sys.*, 399 F. Supp. 3d 780, 801 (W.D. Wis. 2019) (finding  
 9 viable breach of contract claim where a health services contract incorporated defendant's privacy  
 10 policy); *Fero v. Excellus Health Plan, Inc.*, 236 F. Supp. 3d 735, 760 (W.D.N.Y. 2017) (finding  
 11 viable breach of contract claim where the parties' underlying contracts "'incorporated ... the  
 12 relevant Defendants' privacy policies pertaining to personal information"). Plaintiff's untenable  
 13 theory that Harvard's privacy policy is an independently enforceable agreement—absent an  
 14 underlying contract between Plaintiff and Harvard—finds no foothold in the law.

15 Plaintiff cannot save his contract claim by raising a newly-asserted implied contract theory  
 16 that appears nowhere in his Amended Complaint. *See, e.g., Schneider v. Cal. Dep't of Corrections*,  
 17 151 F.3d 1194, 1197 (9th Cir. 1998). Nor do the cases on which Plaintiff relies support the viability  
 18 of such a claim here. In *In re Marriott International, Inc., Customer Data Security Breach*  
 19 *Litigation*, the court applied *Oregon* law to find an implied-in-fact contract, but expressly noted  
 20 that "courts have dismissed implied contract claims based on Washington law." 440 F. Supp. 3d  
 21 447, 486 (D. Md. 2020) (citing *Krottner v. Starbucks Corp.*, 406 F. App'x 129, 131 (9th Cir.  
 22 2010); *Lovell v. P.F. Chang's China Bistro, Inc.*, 2015 WL 4940371, at \*3 (W.D. Wash. Mar. 27,  
 23 2015)). And in *Eaton v. Engelcke Mfg., Inc.*, the court found an implied contract for plaintiff's  
 24 services when the defendant "repeatedly assured [plaintiff] he would be paid for the work." 681  
 25 P.2d 1312, 1315 (Wash. App. 1984). Here, though Plaintiff argues vaguely that "[t]he parties had  
 26 an understanding that Plaintiff would provide the Private Information" only if "Harvard would  
 27 adequately secure it" (Pl.'s Opp'n 21), there are no factual allegations in the Amended Complaint

1 supporting that conclusory statement nor any other implied contract. Indeed, Plaintiff pleads  
 2 virtually no facts about the circumstances under which he provided his information to Harvard,  
 3 and provides no basis on which to find a viable implied contract claim.

4       **D. Plaintiff’s Consumer Protection and Data Breach Law Claims Fail.**

5 Plaintiff’s opposition improperly conflates his consumer protection law claims with his  
 6 data breach notification law claims, and in the process fails to address many of Harvard’s  
 7 arguments. With respect to his data breach law claim, Plaintiff argues primarily that  
 8 Massachusetts’s data breach statute is inapplicable because it applies only to residents of  
 9 Massachusetts. Pl.’s Opp’n 21-22. Harvard agrees that Plaintiff cannot state a claim under the  
 10 Massachusetts statute, but that fact does not entitle Plaintiff to proceed under Washington law.  
 11 Mot. 33-34. Nonetheless, Plaintiff’s claim fails under Washington law, as well, for the reasons  
 12 stated in Harvard’s Motion. *See* Mot. 26.

13 Plaintiff’s consumer protection law claim fares no better. Initially, Plaintiff fails entirely to  
 14 address Harvard’s arguments that he cannot state a claim under Massachusetts Chapter 93A. Mot.  
 15 21-25. And Plaintiff’s claim similarly fails under Washington’s Consumer Protection Act  
 16 (“CPA”). Though Plaintiff argues that courts have permitted CPA claims “stemming from data  
 17 breaches caused by inadequate data security” (Pl.’s Opp’n 22), the cases Plaintiff cites merely  
 18 highlight what the Amended Complaint here lacks: allegations regarding the disclosure of sensitive  
 19 personal information that resulted in harm to the plaintiff, and detailed factual allegations about  
 20 the defendant’s allegedly “inadequate” security practices.

21       In *Buckley v. Santander Consumer USA, Inc.*, for example, the court allowed the plaintiff  
 22 to proceed with some of her CPA claims where she alleged that she lost \$5,000 from a fraudulent  
 23 debt collection scheme “premised on the misuse of her personal information regarding her debt  
 24 with Santander.” No. C17-5813 BHS, 2018 WL 1532671, at \*3 (W.D. Wash. Mar. 29, 2018).  
 25 Critical to the court’s decision was that the defendant “received sensitive personal information that  
 26 could result in significant financial harm to Buckley if mishandled.” *Id.* at \*4. Moreover, the court  
 27  
 28

1 expressly did not allow the plaintiff to proceed with “conclusory claims of ‘deceptive’ acts or  
 2 practices without factual allegations of misrepresentations or omissions.” *Id.* at \*4.

3 And in *Veridian Credit Union*, the court allowed a CPA claim to proceed where “hackers  
 4 stole credit and debit card data from Eddie Bauer’s systems and sold it to other individuals who  
 5 made fraudulent transactions on those payment cards.” 295 F. Supp. 3d at 1148. There, the plaintiff  
 6 pled extensive factual allegations about the defendant’s inadequate security measures, including  
 7 that the defendant “failed to implement appropriate software updates,” and “refus[ed] to implement  
 8 industry-standard security measures due to the cost of such measures.” *Id.* at 1148, 1162. The  
 9 Amended Complaint contains no such detail about Harvard’s alleged failures here. This is fatal to  
 10 Plaintiff’s claim under either Massachusetts or Washington law. *See Mot.* 15-18, 24-25.

11 Plaintiff attempts to sidestep his inadequate pleading about Harvard’s alleged security  
 12 failures by pointing to Harvard’s alleged delay in notifying Plaintiff of the data breach, and its  
 13 alleged failure to notify Plaintiff of Blackbaud’s “September 29, 2020 disclosure of additional  
 14 details regarding the Data Breach.” Pl.’s Opp’n 24. Neither allegation saves Plaintiff’s statutory  
 15 claims from dismissal. Plaintiff has *not* alleged that Harvard unreasonably delayed informing  
 16 Plaintiff of the breach from the point in time *Harvard* became aware of the breach. Rather, Plaintiff  
 17 alleges only a delay between *Blackbaud’s* knowledge of the data breach and Harvard’s  
 18 notification. *See Mot.* 26. This is insufficient to state a claim against Harvard. Plaintiff also fails  
 19 to articulate any injury arising from an alleged delay in Harvard’s disclosure of the breach; he  
 20 alleges injury from the breach itself and does not, for example, alleged that he suffered identity  
 21 theft at all, much less due to a delayed notification. Further, Plaintiff has alleged no basis to find  
 22 that Harvard had a duty to notify Plaintiff of Blackbaud’s September 29 disclosure of “additional  
 23 details,” nor does Plaintiff allege that those “additional details” applied to any data obtained from  
 24 Harvard as opposed to other Blackbaud customers. Indeed, Plaintiff does not even allege that  
 25 Harvard *possessed* the type of highly sensitive information referenced in Blackbaud’s September  
 26 29 disclosure, so lack of disclosure cannot establish a viable claim. *See Mot.* 24-25, 27-28.

27 Plaintiff also fails to plausibly allege that Harvard acted in trade or commerce. That  
 28

1 Washington's legislature has identified violation of Washington's law regulating "charitable  
 2 solicitations" as "a per se violation of the [CPA]" (Pl.'s Opp'n 23) does not establish otherwise.  
 3 Plaintiff does not allege that Harvard violated this statute, nor that Harvard's conduct occurred in  
 4 the context of a charitable solicitation. Plaintiff has not pled facts demonstrating that Harvard's  
 5 actions with respect to Plaintiff's personal data were "commercial." *See* Mot. 23-24.

6       **E. Plaintiff Cannot State a Plausible Claim for Misrepresentation.**

7 Instead of addressing Harvard's arguments for dismissal, Plaintiff merely recites the  
 8 elements of misrepresentation claims under Washington law, and asserts baldly that his "well-pled  
 9 factual allegations" prevent their dismissal. Pl.'s Opp'n 25-26. But the only relevant "factual  
 10 allegations" in the Amended Complaint relate to the actions of *Blackbaud*, not Harvard. None of  
 11 Plaintiff's allegations plausibly suggest that Harvard had any knowledge of the alleged falsity of  
 12 any of its statements, or even that Harvard's statements were in fact false. *See* Mot. 27-28. Plaintiff  
 13 does nothing to address these pleading failures, which are fatal to his misrepresentation claims.

14       **F. Plaintiff Cannot State a Plausible Claim for Invasion of Privacy.**

15 As Plaintiff acknowledges, his invasion of privacy claim rises or falls on the same bases as  
 16 his other claims against Harvard. *See* Pl.'s Opp'n 26-27. And while Plaintiff cites several cases  
 17 identifying actionable privacy interests, none involve the type of non-sensitive, widely available  
 18 information that Plaintiff alleges Harvard disclosed in the Blackbaud data breach. *See, e.g., Int'l*  
*Broth. Of Elec. Workers Local Union No. 5 v. U.S. Dept. of Hous. & Urban Dev.*, 852 F.2d 87, 89  
 19 (3d Cir. 1988) (finding privacy interest in social security numbers). Because Plaintiff has failed to  
 20 plausibly allege that Harvard maintained or disclosed Plaintiff's sensitive personal information,  
 21 Plaintiff's invasion of privacy claim against Harvard must be dismissed.

22  
 23 For the foregoing reasons, this Court should grant Harvard's motion to dismiss the  
 24 Amended Complaint with prejudice.

25 DATED: January 22, 2021

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